A

# Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal

B

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-58–08 OF 2016(B) AND 02(f)-59–08 OF 2016(B)
RAUS SHARIF CHIEF JUSTICE, AHMAD MAAROP CJ (MALAYA), ZAINUN ALI, ABU SAMAH AND RAMLY ALI FCJJ
26 SEPTEMBER 2017

C

*Tort — Negligence — Professional negligence — Medical practitioner — Claim against hospital — Whether hospital owed non-delegable duty of care — Whether features of non-delegable duties as described in Woodland case applied to present case — Whether hospital negligent either in its selection of practitioners, provision of facilities, or system of work — Whether hospital assumed positive duty in respect of conduct of operation — Whether hospital vicariously liable for action of doctor — Whether there was relationship akin to employment between hospital and doctor — Whether doctor's services subject to hospital's control or interference — Whether doctor independent contractor of hospital in conducting operation — Quantum — Whether medical expenses incurred were natural and direct consequence of doctor's negligence — Whether insurance benefits should be taken into account in assessment of damages*

D

E

F

Soo Cheng Lin ('Soo') had consulted Dr Kok Choong Seng ('the doctor'), a consultant orthopedic surgeon, about a lump in his left forearm. The doctor had advised Soo to undergo an operation to remove the lump. On 14 September 2004, the doctor had performed the operation at Sunway Medical Centre Bhd ('the hospital') and Soo was discharged on the same day. After the operation Soo complained of pain and numbness in the area operated upon and was referred by the doctor to a hand and micro surgeon from Pantai Medical Centre, who diagnosed Soo as having lost 90% of his left median nerve and thus conducted a microscopic reconstruction on Soo's left median nerve. Soo claimed that the pain, injuries and suffering he suffered and the additional costs of another surgery to the same area arose from the negligence of the doctor and the hospital. Consequently, Soo brought an action against the doctor and the Hospital in the High Court. The High Court judge found the doctor liable in negligence in his capacity as a medical practitioner, and the hospital liable in negligence as a provider of healthcare services which included the competence, skill and expertise of the doctor. The trial judge also found that the hospital owed a non-delegable duty of care, or a duty which was described as 'a kind of vicarious liability', to Soo to ensure that care was taken. Thus, at the High Court, the plaintiff's claim against the doctor and the hospital was allowed. In terms of quantum, Soo was awarded RM50,000 being

G

H

I

general damages for pain and suffering, and RM5,100 being special damages for physiotherapy, other related treatment and travelling expenses. However, the trial judge rejected Soo's claim of RM19,632.84 for medical expenses, which was paid by Soo's insurers. Aggrieved, the hospital appealed against the finding of vicarious liability for the doctor's negligence, while Soo appealed against the quantum of damages awarded for pain and suffering, and the rejection of the claim of RM19,632.84 for medical expenses. Applying the test laid down in the case of *Woodland v Swimming Teachers Association and others* [2014] AC 537 ('the *Woodland* case'), the Court of Appeal concluded that the hospital owed a non-delegable duty of care to Soo and rejected the relevance of Soo's own choice in engaging the doctor's services. As such, the Court of Appeal dismissed the hospital's appeal on liability. On the other hand, the Court of Appeal found that the deductibility of the insurance payment or the medical expenses paid by Soo's insurers was governed by statute in the form of s 28A(1)(a) of the Civil Law Act 1956 and thus allowed Soo's appeal on quantum. The decision of the Court of Appeal has resulted in the leave granted for the two present appeals, namely the hospital's appeal against the Court of Appeal's decision on liability and the hospital and the doctor's appeal against the decision on quantum. The hospital argued that as medical practitioners were not employees of the hospital but independent contractors, it would be contrary to the Private Healthcare Facilities and Services Act 1998 ('the PHFSA') and the Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 ('the Regulations') to impose a non-delegable duty on private hospitals in relation to the provision of medical services. In relation to vicarious liability the hospital argued that the imposition of vicarious liability on private hospitals would run contrary to the legislative scheme, which provided distinct roles for private hospitals and medical practitioners. Soo in turn argued that the hospital should be responsible for the risks associated with its commercial enterprise, and patients should be able to look to the hospital's deepest pockets to recover damages.

**Held,** allowing the hospital's appeal on liability and dismissing its appeal on quantum:

(1) The nature of a non-delegable duty was, in essence, a positive duty to ensure that reasonable care was taken. However, non-delegable duties represented a 'markedly more onerous obligation' than just a positive duty with the defendant taken to have assumed responsibility for the exercise of due care by anyone to whom performance was delegated. When the features of non-delegable duties as described in the *Woodland* case were applied to the present case, it became clear that the first feature had been satisfied, ie that Soo as a patient admitted and undergoing operation in the premises of the hospital, was in an especially vulnerable position dependent on the hospital against the risk of injury. In relation to the second feature, although Soo was undoubtedly placed under the

actual custody, charge or care of the hospital while he was admitted therein there was no finding of fact as to whether the hospital was negligent either in its selection of practitioners, provision of facilities, or system of work. Further, non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. However, the facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding Soo's engagement of the doctor and admission to the hospital, it can be inferred that Soo reasonably expected the operation to be conducted by the doctor with due care, wherever the doctor referred him to do so. In respect of the conduct of the operation by the doctor, the hospital had not assumed a positive duty to protect the plaintiff from injury. Thus, the second feature in the *Woodland* case formulation was not satisfied on the facts, in that the hospital had not assumed a positive duty in respect of the conduct of the operation (see paras 36–40, 46 & 63–67).

(2) In addition to the second feature in the *Woodland* case not being satisfied on the facts, the questions of how the hospital chose to perform the duty (the third feature), the hospital's delegation of an integral part of that duty (the fourth feature), and the delegatee's negligence in the performance of the duty (the fifth feature) did not arise. Further, the policy argument that the hospital, having undertaken a commercial enterprise for profit, had 'deeper pockets' to which Soo should have recourse and ought to bear the risks of harm caused in that enterprise ran contrary to the fundamental principles on which non-delegable duties were based. This was because non-delegable duties were not imposed based on financial means or profit. Thus, the defining features of non-delegable duties identified in the *Woodland* case were not present in the instant case, and accordingly the hospital was not liable for breach of a non-delegable duty to the plaintiff (see paras 67–70).

(3) Based on recent decisions of the courts it is now apparent that the boundaries of vicarious liability had been expanded to include tortfeasors who are not employees of the defendant but stand in a relationship which is sufficiently akin to employment but not to include those who were clearly independent contractors. In determining whether there was a relationship of employment or akin to employment between the hospital and the doctor, it was necessary to consider the practising agreement signed between the hospital and the doctor, which provided, among others, that the doctor was an independent contractor and not a servant of the hospital. In respect of the element of control, it was clear from the doctor's practising agreement that his services were generally not subject to the hospital's control or interference. Similarly, the doctor was not directed or required by the hospital to conduct the operation, but advised and arranged it in the course of his own practice at his private clinic.

Thus, the doctor was an independent contractor of the hospital in conducting the operation. Since the expansion of vicarious liability did not include 'truly independent contractors' the relationship between the hospital and the doctor was not sufficiently akin to employment so as to give rise to vicarious liability for the doctor's negligence in conducting the operation. The liability for Soo's injuries would lie solely with the doctor (see paras 96–102).

(4) From the line of cases cited it was clear that a plaintiff's right of action against a defendant for the full amount of loss suffered was not diminished or extinguished where such loss was indemnified by an insurer, whether or not the insurer chose to exercise its right of subrogation. Applying the principles gleaned from the cases cited to the present case, the medical expenses for the treatment of the injuries suffered by Soo were a natural and direct consequence of the doctor's negligent act, for which the doctor was liable. Soo was entitled under his insurance policy to have the expenses paid for by his insurer, having made a contractual arrangement with his insurer and paid the premiums to provide for the very contingency. Soo's contract with the insurer was a collateral and extraneous matter, and did not impinge Soo's claim against the doctor for damages suffered as a direct consequence of the tort. Thus, Soo retained his right of action against the doctor for the full amount of damage suffered including those expenses. Soo was entitled to his claim for medical expenses of RM19,632.84 under both the common law and s 28A(1)(a) of the Civil Law Act 1956 (see paras 106–107, 110, 116, 129, 136, 139 & 154–155).

**[Bahasa Malaysia summary**

Soo Cheng Lin ('Soo') telah berunding dengan Dr Kok Choong Seng ('doktor'), seorang perunding pakar bedah ortopedik, tentang benjolan di lengan kirinya. Doktor telah menasihati Soo untuk menjalani satu pembedahan untuk membuang benjolan tersebut. Pada 14 September 2004, doktor telah membuat pembedahan di Pusat Perubatan Sunway Bhd ('hospital') dan Soo telah dibenarkan keluar pada hari yang sama. Selepas pembedahan Soo mengadu kesakitan dan kebas pada bahagian yang dibedah dan dirujuk oleh doktor kepada pakar bedah tangan dan mikro dari Pantai Medical Centre, yang mendiagnoskan Soo telah kehilangan 90% saraf median kiri dan dengan itu melakukan pembedahan mikroskopik pada saraf meridian kirinya. Soo menyatakan bahawa kesakitan, kecederaan dan penderitaan yang dialaminya dan kos tambahan pembedahan satu lagi pada kawasan yang sama berlaku akibat kecuaian doktor dan hospital. Akibatnya, Soo mengambil tindakan terhadap doktor dan hospital di Mahkamah Tinggi. Hakim Mahkamah Tinggi mendapati doktor bertanggungjawab dalam kecuaian dalam kapasitinya sebagai pengamal perubatan, dan hospital bertanggungjawab dalam kecuaian sebagai penyedia perkhidmatan penjagaan

kesihatan yang termasuk kecekapan, kemahiran dan kepakaran doktor. Hakim perbicaraan juga mendapati bahawa hospital menanggung kewajipan berhati-hati tidak boleh diwakilkan, atau kewajipan yang digambarkan sebagai 'a kind of vicarious liability', kepada Soo untuk memastikan penjagaan itu dilakukan. Maka, di Mahkamah Tinggi, tuntutan plaintif terhadap doktor dan hospital dibenarkan. Berkaitan dengan kuantum, Soo diawardkan RM50,000 sebagai ganti rugi am untuk kesakitan dan penderitaan, dan RM5,100 sebagai ganti rugi khas untuk fisioterapi, rawatan lain yang berkaitan dan perbelanjaan perjalanan. Walau bagaimanapun, hakim perbicaraan menolak tuntutan Soo sebanyak RM19,632.84 untuk perbelanjaan perubatan, yang dibayar oleh pihak insurans Soo. Terkilan, hospital merayu terhadap dapatan liabiliti vikarius bagi kecuaian doktor, manakala Soo merayu terhadap kuantum ganti rugi yang diawardkan untuk kesakitan dan penderitaan, dan penolakan tuntutan RM19,632.84 untuk perbelanjaan perubatan. Mengguna pakai ujian yang ditetapkan di dalam kes *Woodland v Swimming Teachers Association and others* [2014] AC 537 ('kes *Woodland*'), Mahkamah Rayuan memutuskan bahawa hospital menanggung kewajipan berhati-hati tidak boleh diwakilkan terhadap Soo dan menolak kerelevanan pilihan sendiri Soo dalam mendapatkan perkhidmatan doktor. Dengan itu, Mahkamah Rayuan menolak rayuan hospital atas liabiliti. Sebaliknya, Mahkamah Rayuan mendapati bahawa potongan terhadap pembayaran insurans atau perbelanjaan perubatan yang dibayar oleh syarikat insurans Soo telah dikawal oleh statut dalam bentuk s 28A(1)(a) Akta Undang-Undang Sivil 1956 dan dengan itu membenarkan rayuan Soo atas kuantum. Keputusan Mahkamah Rayuan telah menyebabkan izin yang dibenarkan untuk dua rayuan ini, iaitu rayuan hospital terhadap keputusan Mahkamah Rayuan atas liabiliti dan rayuan hospital dan doktor terhadap keputusan atas kuantum. Hospital menghujahkan bahawa memandangkan pengamal perubatan bukanlah pekerja-pekerja hospital tetapi kontraktor bebas, ia akan bertentangan Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 ('AKPJKS') dan Peraturan-Peraturan Kemudahan dan Perkhidmatan Penjagaan Kesihatan Swasta ('Hospital Swasta dan Lain-Lain Kemudahan Kesihatan Swasta) 2006 ('Peraturan-Peraturan') untuk mengenakan kewajipan tidak boleh diwakilkan terhadap hospital swasta berkaitan dengan peruntukan perkhidmatan perubatan. Berkaitan dengan liabiliti vikarius hospital menghujahkan bahawa pengenaan liabiliti vikarius terhadap hospital swasta akan bertentangan dengan skema undang-undang, yang memperuntukkan peranan yang berbeza untuk hospital swasta dan pengamal perubatan. Soo pula menghujahkan bahawa hospital sepatutnya bertanggungjawab untuk risiko yang berkaitan dengan perniagaan komersialnya, dan pesakit harus dapat melihat dengan teliti keupayaan hospital untuk mendapatkan ganti rugi.

**Diputuskan,** membenarkan rayuan hospital atas liabiliti dan menolak rayuannya atas kuantum:

(1) Sifat kewajipan tidak boleh didelegasikan, pada asasnya, kewajipan positif untuk memastikan penjagaan munasabah telah diambil. Walau bagaimanapun, kewajipan tidak boleh didelegasi menggambarkan satu 'markedly more onerous obligation' daripada sekadar kewajipan positif dengan defendan dianggap telah mengambil alih tanggungjawab untuk menjalankan kewajipan berhati-hati oleh orang yang kepadanya prestasi telah diwakilkan. Apabila ciri kewajipan tidak boleh didelegasi seperti yang digambarkan dalam kes *Woodland* diguna pakai dalam kes ini, ia menjadi jelas bahawa ciri yang pertama telah dipenuhi, iaitu Soo sebagai pesakit yang dimasukkan ke hospital dan menjalani pembedahan dalam premis hospital, adalah dalam kedudukan yang amat terdedah dengan bergantung kepada hospital terhadap risiko kecederaan. Berkaitan dengan ciri kedua, walaupun Soo telah pasti diletakkan di bawah jagaan, tanggungjawab atau penjagaan hospital semasa dia dimasukkan di dalamnya tidak terdapat dapatan fakta terhadap sama ada hospital cuai sama ada dalam pemilihan pengamal, penyediaan kemudahan, atau sistem kerja. Selanjutnya, kewajipan tidak boleh diwakilkan adalah berdasarkan andaian kewajipan, disimpulkan daripada keadaan mengenai perhubungan antara plaintif dan defendan. Walau bagaimanapun fakta dalam kes ini bertentangan kewujudan terhadap perhubungan sebelum itu. Daripada keadaan penglibatan Soo dengan doktor dan kemasukan ke hospital, ia boleh disimpulkan bahawa Soo secara munasabah mengharapkan pembedahan akan dilakukan oleh doktor dengan kewajipan berhati-hati, di mana sahaja doktor merujuknya untuk berbuat demikian. Berkaitan dengan tindakan pembedahan oleh doktor, hospital tidak mengandaikan kewajipan positif untuk melindungi plaintif daripada kecederaan. Maka, ciri kedua dalam perumusan kes *Woodland* tidak dipenuhi atas fakta, dengan itu hospital tidak mengandaikan kewajipan positif berkaitan dengan tindakan pembedahan (lihat perenggan 36–40, 46 & 63–67).

(2) Sebagai tambahan kepada ciri kedua dalam kes *Woodland* tidak dipenuhi atas fakta, persoalan bagaimana hospital memilih untuk menjalankan kewajipan (ciri ketiga), delegasi hospital sebagai bahagian penting kewajipan itu (ciri keempat), dan kecuaian delegasi dalam pelaksanaan tugas itu (ciri kelima) tidak timbul. Selanjutnya, hujahan polisi bahawa hospital, yang menjalankan perniagaan komersial untuk keuntungan, mempunyai 'deeper pockets' yang mana Soo harus mempunyai jalan keluar dan harus menanggung risiko bahaya yang disebabkan di mana perusahaan yang bertentangan dengan prinsip asas yang merupakan asas kewajipan tidak boleh didelegasi. Ini adalah kerana kewajipan tidak boleh didelegasikan tidak dikenakan berdasarkan kaedah kewangan atau keuntungan. Maka, ciri yang menentukan kewajipan tidak boleh delegasi yang dikenal pasti dalam kes *Woodland* tidak terdapat dalam kes ini, dan sewajarnya hospital tidak bertanggungan untuk pelanggaran

kewajipan tidak boleh delegasi terhadap plaintif (lihat perenggan 67–70).

(3) Berdasarkan keputusan terkini mahkamah adalah jelas kini bahawa sempadan liabiliti vikarius telah diperluaskan termasuk pelaku tort yang bukan pekerja defendan tetapi berdiri dalam hubungan yang cukup mirip dengan pekerjaan tetapi tidak termasuk mereka yang jelas kontraktor bebas. Dalam menentukan sama ada terdapat hubungan pekerjaan atau mirip kepada pekerjaan antara hospital dan doktor, ia adalah perlu untuk mempertimbangkan perjanjian amalan yang ditandatangani antara hospital dan doktor, yang memperuntukan, antara lain, bahawa doktor adalah kontraktor bebas dan bukan penjawat hospital. Berkaitan dengan elemen kawalan, adalah jelas daripada perjanjian amalan doktor bahawa perkhidmatannya secara am tidak tidak tertakluk kepada kawalan atau campur tangan hospital. Sama juga, doktor tidak diarahkan atau dikehendaki oleh hospital untuk melakukan pembedahan, tetapi menasihati dan menyusunnya dalam perjalanan amalan sendiri di klinik peribadinya. Maka, doktor adalah kontraktor bebas hospital dalam menjalankan pembedahan. Memandangkan perluasan liabiliti vikarius tidak termasuk 'truly independent contractors' perhubungan antara hospital dan doktor tidak cukup mirip kepada pekerjaan untuk menimbulkan liabiliti vikarius untuk kecuaian doktor dalam menjalankan pembedahan. Liabiliti untuk kecederaan Soo akan terletak sepenuhnya ke atas doktor (lihat perenggan 96–102).

(4) Daripada kes-kes yang dirujuk adalah jelas bahawa hak plaintif terhadap defendan untuk jumlah kehilangan penuh yang dialami tidak berkurangan atau dibatalkan di mana kehilangan telah dibayar oleh syarikat insurans, sama ada atau tidak syarikat insurans memilih untuk melaksanakan haknya untuk subrogasi. Mengguna pakai prinsip-prinsip yang diperolehi daripada kes-kes yang dirujuk kepada kes ini, perbelanjaan perubatan bagi kecederaan yang dialami oleh Soo adalah akibat semula jadi dan langsung tindakan kecuaian doktor, yang mana doktor bertanggungan. Soo berhak di bawah polisi insuransnya untuk mendapatkan perbelanjaan dibayar oleh syarikat insuransnya, dengan membuat penyusunan kontrak dengan syarikat insuransnya dan membayar premium untuk peruntukan kontigensi tersebut. Kontrak Soo dengan syarikat insurans adalah cagaran dan perkara luar, dan tidak meninggalkan kesan terhadap tuntutan Soo terhadap doktor untuk ganti rugi yang dialami sebagai akibat langsung daripada tort itu. Oleh itu, Soo mengekalkan haknya untuk mengambil tindakan terhadap doktor untuk jumlah penuh ganti rugi yang dialami termasuk perbelanjaan tersebut. Soo berhak menuntut perbelanjaan perubatannya sebanyak RM19,632.84 di bawah common law dan s 28A(1)(a) Akta Undang-Undang Sivil 1956 (lihat perenggan 106–107, 110, 116, 129, 136, 139 & 154–155).]

**Notes**

For cases on negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1096–2229.

**Cases referred to**

*Anna Jong Yu Hiong v Government of Sarawak* [1972] 2 MLJ 244, FC (refd)
*Bradburn v The Great Western Railway Company* (1874) LR 10 Exch 1 (refd)
*Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42, HC (refd)
*Cassidy v Ministry of Health* [1951] 2 KB 343, CA (refd)
*Commonwealth of Australia v Introvigne* [1982] 150 CLR 258; (1982) 41 ALR 577, HC (refd)
*Corporation of Glasgow v Muir and Others* [1943] 2 All ER 44; [1943] AC 448, HL (refd)
*Cox v Ministry of Justice* [2016] AC 660, SC (refd)
*Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234, SC (refd)
*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, FC (refd)
*Dubai Aluminium Co Ltd v Salaam and others* [2003] 2 AC 366, HL (refd)
*E v English Province of Our Lady of Charity and another* [2012] 4 All ER 1152; [2012] EWCA Civ 938, CA (refd)
*Gold v Essex County Council* [1942] 2 KB 293, CA (refd)
*Haley v London Electricity Board* [1964] 3 All ER 185; [1965] AC 778, HL (refd)
*Hillyer v The Governors of St Bartholomew's Hospital* [1909] 2 KB 820, CA (refd)
*Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, FC (refd)
*Hobbs v Marlowe* [1977] 2 All ER 241; [1978] AC 16, CA (refd)
*Hodgson v Trapp and another* [1988] 3 All ER 870; [1989] AC 807, HL (refd)
*Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541; [1988] AC 514, HL (refd)
*Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy* [2005] 2 MLJ 679, HC (refd)
*Kondis v State Transport Authority* (1984) 55 ALR 225, HC (refd)
*Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, PC (refd)
*Liffen v Watson* [1940] 1 KB 556, CA (refd)
*Lister and others v Hesley Hall Ltd* [2002] 1 AC 215, HL (refd)
*Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] SGCA 40, CA (refd)
*Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, SC (refd)
*Mary Colete John v South East Asia Insurance Bhd* [2010] 6 MLJ 733, FC (refd)
*Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 (refd)
*Mitchell and another v Glasgow City Council* [2009] AC 874, HL (refd)

*Mohamud v WM Morrison Supermarkets plc* [2016] AC 677, SC (refd)
*Morley v Moore* [1936] 2 KB 359, CA (refd)
*Nabi v British Leyland (UK) Ltd* [1980] 1 All ER 667, CA (refd)
*National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, HC (refd)
*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, FC (refd)
*Parry v Cleaver* [1970] AC 1, HL (refd)
*Roe v Minister of Health* [1954] 2 QB 66, QBD (refd)
*Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295, FC (refd)
*Sathisvaran a/l Chandrasegaran v Agilan a/l Vanmugelan & Anor* [2012] 4 MLJ 548, CA (refd)
*Seagate Technology Pte Ltd & Anor v Goh Han Kim* [1995] 1 SLR 17, CA (refd)
*Shearman v Folland* [1950] 2 KB 43, CA (refd)
*Short v J & W Henderson Ltd* [1946] SC (HL) 24, HL (refd)
*Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1, FC (refd)
*Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban* [2006] 3 MLJ 174, HC (refd)
*Smith and others v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party) and conjoined appeal* [1987] 1 All ER 710; [1987] AC 241, HL (refd)
*Staveley Iron & Chemical Co Ltd v Jones* [1956] 1 All ER 403, HL (refd)
*Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125, FC (refd)
*Ti Huck & Anor v Mohamed Yusof* [1973] 2 MLJ 62, FC (refd)
*Various Claimants v Catholic Child Welfare Society and others* [2013] 1 All ER 670; [2013] 2 AC 1; [2012] UKSC 56, SC (folld)
*Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317, SC (refd)
*Woodland v Swimming Teachers Association and others* [2014] AC 537, SC (folld)
*X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals* [1995] 3 All ER 353; [1995] 2 AC 633, HL (refd)
*Zarkovic Stanko v Owners Of The Ship Or Vessel 'Mara'* [2000] 4 SLR 156, CA (refd)

**Legislation referred to**

Civil Law Act 1956 s 28A, 28A(1), (1)(a), (2)(d)
Interpretation Acts 1948 and 1967 s 17A
Private Healthcare Facilities and Services Act 1998 ss 2, 78, 78(a), (b), (c)
Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 regs 11(4), 14(1)

**Appeal from:** Civil Appeal Nos B-02–710–03 of 2013 and

B-02(W)-1731–10 of 2015 (Court of Appeal, Putrajaya)

*Darryl Goon (Raja Eileen Soraya and Joni Benedict with him) (Raja Darryl & Loh) Civil Appeal No 02(f)-58–08 of 2016(B) for the appellants.*
*Darryl Goon (Raja Eileen Soraya and Joni Benedict with him) (Raja Darryl & Loh) Civil Appeal No 02(f)-59–08 of 2016(B) for the appellant.*
*PS Ranjan (MS Dhillon, Dev Sundram and Jason Low with him) (PS Ranjan & Co) in Civil Appeal Nos 02(f)-58–08 of 2016(B) and 02(f)-59–08 of 2016(B) for the respondent.*

**Raus Sharif Chief Justice (delivering judgment of the court):**

INTRODUCTION

**[1]** The present appeals arose from a claim in medical negligence brought by Soo Cheng Lin against Sunway Medical Centre Bhd, the owner and operator of a private hospital known as Sunway Medical Centre, and Dr Kok Choong Seng, a consultant orthopaedic surgeon. In these appeals, Soo Cheng Lin will be referred to as the plaintiff, Dr Kok Choong Seng the surgeon as Dr Kok, and Sunway Medical Centre Bhd as the hospital.

**[2]** These two appeals were against the decision of the Court of Appeal given on 31 May 2016. The hospital appealed against the Court of Appeal decision on liability ('the appeal on liability'), whereas the hospital and Dr Kok brought an appeal against the decision on quantum ('the appeal on quantum').

**[3]** Leave to appeal was granted by this court on 8 August 2016. In Civil Appeal No 02(f)-59–08 of 2016(B) (the appeal on liability), there were four questions of law posed:

(i) Whether the doctrine of non-delegable duty of care expounded in *Woodland v Swimming Teachers Association and others* [2014] AC 537 applies in Malaysia?

(ii) If the doctrine of non-delegable duty of care as expounded in *Woodland v Swimming Teachers Association and others* [2014] AC 537 is applicable in Malaysia, whether the doctrine can or should apply to private hospitals such that those hospitals would be held liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising there as independent contractors?

(iii) Whether the criteria for imposing vicarious liability set out by Lord Phillips in the decision of the Supreme Court of UK in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 and as further explained and elaborated by the Supreme Court of UK in *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 applies in Malaysia?

A (iv) Whether private hospitals in Malaysia such as the appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?

B **[4]** In Civil Appeal No 02(f)-58–08 of 2016(B) ('the appeal on quantum'), the question of law posed reads:

> Whether, in the light of s 28A(1)(a) of the Civil Law Act 1956, a plaintiff who has suffered personal injuries by reason of a defendant's act or omission, may be awarded, as part of damages, medical expenses incurred in respect of his personal
C injuries, but which medical expenses were borne and paid by an insurer?

**[5]** We heard these two appeals together on 17 April 2017, and adjourned the matter for our decision. We now give our decision and the reasons for the same.

D

*Material facts*

**[6]** The plaintiff had a lump in his left forearm and consulted Dr Kok at the latter's clinic in Taman Desa on 9 September 2004. Dr Kok advised the plaintiff
E to undergo an operation to remove the lump. On 13 September 2004, Dr Kok wrote to the hospital for the plaintiff to be admitted thereto. On 14 September 2004, Dr Kok performed the operation on the plaintiff's forearm at the hospital and the plaintiff was discharged on the same day.

F

**[7]** On several occasions after the operation on 16 September 2004, 20 September 2004 and 23 September 2004, the plaintiff complained to Dr Kok of pain and numbness at the area of his forearm which was operated upon. Dr Kok referred the plaintiff to Dr Ranjit Singh, a hand and micro
G surgeon from Pantai Medical Centre. The plaintiff was diagnosed as having lost 6cm or 90% of his left median nerve. On 21 October 2004, Dr Ranjit Singh conducted a microscopic reconstruction on the plaintiff's left median nerve using a nerve graft from his left leg.

H **[8]** The plaintiff brought an action against Dr Kok and the hospital in the High Court for negligence and breach of contract. It was alleged that as a result of Dr Kok's negligence, the plaintiff suffered injuries including pain, numbness and weakness in his left arm. As against the hospital, the plaintiff alleged that the hospital owed him a non-delegable duty to ensure that he was treated with
I care and skill by the healthcare personnel at the hospital, and that the hospital failed to provide a safe and reliable system for the treatment and referral of patients.

*At the High Court*

**[9]** At the High Court, the plaintiff's claim against Dr Kok and the hospital was allowed. The learned High Court judge found Dr Kok liable in negligence in his capacity as a medical practitioner, and the hospital liable in negligence as a provider of healthcare services which include the competence, skill and expertise of Dr Kok. The learned trial judge held that the hospital owed a non-delegable duty of care to the plaintiff and to ensure that care is taken, a duty which was described as 'a kind of vicarious liability'. Because the hospital's duty could not be discharged by delegating it to Dr Kok under a contract for services, the hospital was liable for the acts and omissions of Dr Kok, and it is immaterial whether Dr Kok is an employee or an independent contractor.

**[10]** Rejecting the plaintiff's personal choice of doctor as an appropriate basis for liability, the learned trial judge opined that 'no person would knowingly choose an incompetent or negligent medical practitioner'. Instead, the learned trial judge suggested that liability should depend on which party is in a better position to evaluate Dr Kok's competence: it is the hospital who has the resources and interest to ensure that doctors providing services in their premises have the necessary expertise.

**[11]** Invoking policy considerations, the learned trial judge held that the hospital should bear liability for losses incurred in the conduct of a commercial enterprise for which it earns profit. It was explained that such an enterprise is in a position to pass on risks and costs to other parties, reflecting the principle of loss distribution. The plaintiff 'would stand to benefit from access to the deeper pockets of commercial enterprises' like the hospital.

**[12]** In terms of quantum, the plaintiff was awarded RM50,000 being general damages for pain and suffering, and RM5,100 being special damages for physiotherapy, other related treatment and travelling expenses. However, the learned trial judge rejected the plaintiff's claim of RM19,632.84 for medical expenses, which was paid by the plaintiff's insurers. In disallowing the claim for medical expenses, the learned trial judge distinguished the Supreme Court decision in *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ 317 and found that s 28A of the Civil Law Act 1956 was not applicable. The learned judge further explained as follows:

> I disallowed the plaintiff's claim for medical expenses for the amount of RM19,632.84 because the amount had been paid by insurers and does not qualify as expenses incurred by the plaintiff. This is also consistent with the underlying philosophy that damages are compensatory in nature. To allow the plaintiff 'damages' would be akin to 'unjust enrichment'.

*At the Court of Appeal*

**[13]** Aggrieved, the hospital appealed against the finding of vicarious liability for Dr Kok's negligence. The plaintiff appealed against the quantum of damages awarded for pain and suffering, and the rejection of the claim for medical expenses.

**[14]** The Court of Appeal dismissed the hospital's appeal on liability. In determining the issue of the hospital's liability for Dr Kok's negligence, the Court of Appeal adopted the jurisprudence of non-delegable duties expounded in *Woodland*. In this regard, the court emphasised the caveat that a non-delegable duty should be imputed only in so far as it would be fair, just and reasonable in the circumstances of each individual case.

**[15]** Applying the *Woodland* test to the facts, the Court of Appeal found that the plaintiff became a patient of the hospital upon admission, and was vulnerable or dependent on the hospital's protection against the risk of injury. By reason of the hospital's nature as a healthcare service provider, the Court of Appeal found no difficulty in imputing the assumption of a positive duty on the hospital to protect the plaintiff from harm. Further, the court agreed with the learned trial judge's reasoning in rejecting the relevance of the plaintiff's own choice in engaging Dr Kok's services. The Court of Appeal concluded that the Hospital owed a non-delegable duty of care to the plaintiff.

**[16]** The Court of Appeal allowed the plaintiff's appeal on quantum. In its reasoning, the court followed the decision in *Ward* and found that the deductibility of the insurance payment is governed by statute in the form of s 28A(1)(a) of the Civil Law Act 1956. The Court of Appeal held that the plain and natural meaning of the section includes the medical expenses paid by the plaintiff's insurers, for it cannot be disputed that medical expenses are damages recoverable from personal injury, and that the payment by the plaintiff's insurer was made under a contract of insurance.

**[17]** Further, it was held that unjust enrichment, being an equitable concept developed by the common law, did not apply where there was a statutory provision catering for the specific scenario. In any event, the Court of Appeal found that there was no unjust enrichment:

> It is undisputed that the plaintiff had in his wisdom taken out a private medical insurance and had paid the necessary premium to be covered. This is a contractual arrangement between the plaintiff and his insurance company which is independent of the negligent act of the first and second defendants.

APPEAL ON LIABILITY: FIRST QUESTION

**[18]** We will first deal with the appeal on liability. The first question in the appeal on liability reads: 'Whether the doctrine of non-delegable duty of care expounded in *Woodland v Swimming Teachers Association and others* [2014] AC 537 applies in Malaysia?'. Counsel for the plaintiff and the hospital submit that the question should be answered in the affirmative.

*The test in Woodland*

**[19]** The starting point is the case itself. In *Woodland*, the claimant was a pupil at a school, for which the defendant educational authority was responsible. Pupils at the school had swimming lessons, which was part of the national curriculum, during normal school hours at a pool run by another local authority. The lessons were taught by a swimming teacher with a lifeguard in attendance, neither of whom were employed by the educational authority. Their services were provided to the authority by an independent contractor.

**[20]** During one such lesson, the claimant suffered a serious brain injury. The claimant brought a claim for damages for personal injury, alleging negligence on the part of the swimming teacher and the lifeguard, and a non-delegable duty of care on the part of the education authority. The High Court struck out the claimant's claim on the basis of non-delegable duty and the Court of Appeal affirmed the decision. The claimant's appeal to the Supreme Court was unanimously allowed.

**[21]** Delivering the main judgment of the Supreme Court, Lord Sumption highlighted at the outset that the issue in the case had 'nothing to do with vicarious liability, except in the sense that it only arises because there is none'. Given that the authority was not vicariously liable for the negligence of the independent contractors, the issue concerned the scope of the authority's duty to pupils in its care: whether it is a duty to take reasonable care in performing the functions entrusted to it, or a duty to procure that reasonable care was taken by whomever it gets to perform those functions. On either view, 'any liability of the education authority for breach of it is personal, not vicarious'.

**[22]** Lord Sumption referred to the general principle that the law of negligence is fault-based, in that it does not impose personal liability for the acts or omissions of others. His Lordship articulated the meaning of 'non-delegable duty' as 'the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others'.

**[23]** Non-delegable duties are characterised as arising from an assumption of responsibility imputed to the defendant, by virtue of his special relationship with the claimant. In the law of negligence, Lord Sumption observed, the concept of assumption of responsibility is relevant in determining the scope of a duty of care, for instance whether the duty gives rise to liability for omissions or purely economic loss. However, non-delegable duties represent a 'markedly more onerous obligation' than just a positive duty: the defendant is taken to have assumed responsibility for the exercise of due care by anyone to whom performance is delegated. His Lordship opined that the personal and non-delegable character of the duty is derived from additional factors, such as the claimant's vulnerability, and the defendant's custody or control over the former.

**[24]** Lord Sumption observed that non-delegable duties have long been recognised in English law, but without a single unifying theory to explain when or why they exist. The cases in which such a duty was held to arise were classified into two broad categories. The first category is 'a large, varied and anomalous class of cases', where the defendant engages an independent contractor to perform an inherently hazardous function or one which is liable to become so in the course of his work. The second category, which was 'directly on point', comprises cases where the common law imposes a duty upon the defendant with three critical characteristics:

> First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own.

**[25]** Recognising the principle of non-delegable duty as expounded by Lord Greene in *Gold v Essex County Council* [1942] 2 KB 293 and Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343, Lord Sumption identified five defining features of the second category in a passage reproduced in full below:

> If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features:
>
> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,

(i) which places the claimant in the actual custody, charge or care of the defendant, and

(ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant.

It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

**[26]** On the facts, the Supreme Court held that the education authority had assumed a non-delegable duty to ensure that the claimant's swimming lessons were carefully conducted and supervised, by whomever they entrusted to perform those functions. The control over the claimant that went with the school's teaching function was delegated to the contractors for the purposes of the swimming lessons. Since the alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform, the education authority was found to be in breach of duty for the contractors' negligence in performing those functions.

**[27]** Notably, His Lordship stressed that non-delegable duties of care should be imputed 'only so far as it would be fair, just and reasonable'. Expressing agreement with the test set out by Lord Sumption, Lady Hale nevertheless emphasised that the boundaries of the responsibility undertaken may not always be clear cut, but will have to be ascertained on a case by case basis. Her Ladyship stressed the need for caution in developing the law beyond chartered waters:

The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. *So it must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle*: see

A *Caparo Industries plc v Dickman* [1990] 2 AC 605. But the words used by judges in explaining why they are deciding as they do are not be treated as if they were the words of statute, setting the rules in stone and precluding further principled development should new situations arise. These things have been said many times before by wiser judges than me, but are worth repeating in this case, where we are
B accepting an invitation to develop the law beyond the point which it has currently reached in this jurisdiction. (Emphasis added.)

**[28]** Non-delegable duties, as a concept distinct from vicarious liability, have been established in other Commonwealth jurisdictions. Prior to *Woodland*, a
C similar formulation was propounded by the High Court of Australia in *Kondis v State Transport Authority* (1984) 55 ALR 225 (see also *Commonwealth of Australia v Introvigne* [1982] 150 CLR 258; (1982) 41 ALR 577 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42). Mason J discerned
D that non-delegable duties are recognised where there is 'some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed', and elaborated that:

E In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.

F **[29]** More recently, the Singapore Court of Appeal has considered the issue in detail in *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] SGCA 40. The Court of Appeal analysed the distinction between vicarious liability and non-delegable duties as follows:

G

... there are at least two separate legal doctrines which permit 'derogation' from the fault-based principle and impose tortious liability on a defendant for the negligence of another: the first is vicarious liability, where an employer may be subject to tortious liability for the negligence of its employee; and the second is non-delegable
H duties, where a party may be subject to tortious liability even if the negligent party was its independent contractor. *In this sense, vicarious liability and liability which arises out of non-delegable duties may be said to be closely linked doctrines. Conceptually, however, the doctrines are separate and distinct.* (Emphasis added.)

I **[30]** The Singapore Court of Appeal then expressed approval for the defining features *Woodland* as characteristic of many of the established instances where non-delegable duties arise, and laid out the following test:

In our judgment, moving forward, to demonstrate that a non-delegable duty arises on a particular set of facts, a claimant must minimally be able to satisfy the court

> either that: (a) the facts fall within one of the established categories of non-delegable duties; or (b) the facts possess all the features described at [58] above [the five defining features in *Woodland*]. However, we would hasten to add that (a) and (b) above merely lay down threshold requirements for satisfying the court that a non-delegable duty exists — the court will additionally have to take into account the fairness and reasonableness of imposing a non-delegable duty in the particular circumstance, as well as the relevant policy considerations in our local context.

**[31]** In Malaysia, the concept of a non-delegable duty has been applied in *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234 in the context of extra-hazardous operations. Our then Supreme Court explained that a non-delegable duty of care requires a defendant who engages a contractor to 'see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor'. The court recognised certain situations where non-delegable duties exist, broadly corresponding to the first category described by Lord Sumption, including the withdrawal of support to neighbouring land and work conducted on a highway. On the facts of the case, the defendant was held liable for the harm occasioned to the plaintiff, in a situation of special danger created by an independent contractor's extra hazardous act or omission.

*Our decision on the first question*

**[32]** The doctrine of non-delegable duty is not without its critics. The concept has been dismissed as a 'logical fraud' for departing from the general common law duty to take reasonable care, and imposing strict liability on a person where injury occurs through no fault of his own or his servants (G Williams, *Liability for independent contractors*, (1956) CLJ 180). The underlying principle of assumption of responsibility has also been criticised for its difficulty in application and lack of guidance to delineate which responsibilities have been undertaken (P Giliker, *Vicarious liability, non-delegable duties and teachers: can you outsource liability for lessons?* (2015) 31 PN 259; R George, *Non-delegable duties of care in tort* (2014) 130 LQR 534).

**[33]** We consider the characterisation of non-delegable duties as a departure from basic principles of negligence to be misconceived. As Mason J remarked in *Commonwealth of Australia v Introvigne* [1982] 150 CLR 258; (1982) 41 ALR 577:

> This criticism fails to acknowledge that the law has, for various reasons, imposed a special duty on persons in certain situations to take particular precautions for the safety of others ...

**[34]** The law of negligence is no stranger to the concept of positive duty to protect another from harm. A positive duty to guard against harm caused by a third party may arise from a special relationship between the plaintiff and the defendant, giving rise to an assumption of responsibility by the defendant, or where a risk or a source of danger has been created (*Smith and others v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party) and conjoined appeal* [1987] 1 All ER 710; [1987] AC 241 and *Mitchell and another v Glasgow City Council* [2009] AC 874).

**[35]** Further, it is trite that the common law duty of care is a duty to take reasonable care, and the standard of conduct that meets the requirement of reasonable care in any particular circumstances are determined based on a consideration of multiple factors (see M Jones, *Clerk & Lindsell on Torts* (21st Ed, London: Sweet & Maxwell, 2016) at 8-145). For instance, the known vulnerability of the victim is a factor in determining the level of care required (*Haley v London Electricity Board* [1964] 3 All ER 185; [1965] AC 778). Another relevant factor is the severity of the danger or risk involved: 'those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life' (per Lord MacMillan in *Corporation of Glasgow v Muir and Others* [1943] 2 All ER 44; [1943] AC 448), and 'this involves no departure from the standard of reasonable care for it predicates that the reasonable man will take more stringent precautions to avoid the risk of injury arising from dangerous operations' (per Mason J in *Kondis*).

**[36]** The nature of a non-delegable duty is, in essence, a positive duty to ensure that reasonable care is taken. Viewed in its proper context thus, non-delegable duties are not an anomaly in the law of negligence without a common basis, but founded on established concepts rooted in the general principles of the law of negligence itself. An assumption of responsibility may be inferred from the creation of a special risk, or a special antecedent relationship between him and the claimant. The assumption of responsibility gives rise to a positive duty to protect the claimant from harm, and forms the rationale for imposing a more onerous duty of care on the defendant. Indeed, the concept of assumption of responsibility has been posited as the unifying basis that may serve to explain both Lord Sumption's first and second categories of cases (see J Murphy, *Juridical foundations of common law non-delegable duties* in JW Neyers et al, *Emerging Issues in Tort Law* (Oxford: Hart, 2007)).

**[37]** The defining features, including the claimant's vulnerability or dependence and the defendant's control or custody over the claimant, are factors well-recognised to require a higher standard of care. Where a particular combination of such factors (as identified by Lord Sumption) exists, the standard of care is exceptionally heightened so that the requirement of

reasonable care is not met simply by delegating the function to a competent contractor, but by ensuring that due care is exercised in the performance of that function by whomever is appointed to do so. However, liability for breach of a non-delegable duty does not amount to strict liability for *any* injury or damage caused in the performance of that function. The duty is discharged as long as reasonable care is taken by the delegatee (see *Roe v Minister of Health* [1954] 2 QB 66).

**[38]** Non-delegable duties have been erroneously considered as a 'kind of vicarious liability', and adopted as part of the test to determine vicarious liability in some cases. This is a misconception. The two doctrines are similar in effect, in that they both result in liability being imposed on a party (the defendant) for the injury caused to a victim (the plaintiff) as a result of the negligence of another party (the tortfeasor). However, it bears emphasis that non-delegable duties and vicarious liability are distinct in nature and basis. The former imposes personal liability on the defendant for the breach of his own duty towards the plaintiff, based on the relationship *between the defendant and the plaintiff*, regardless of whom the defendant has engaged to perform the task. The latter imposes vicarious liability on the defendant for the tortfeasor's breach of duty towards the plaintiff, based on the relationship of employment *between the defendant and the tortfeasor*.

**[39]** The doctrine of non-delegable duties has an independent scope of application apart from the realm of vicarious liability. A number of scenarios illuminate the distinction. Non-delegable duties, or positive duties to ensure that reasonable care is taken, may exist in situations where there is no vicarious liability: for instance where harm is caused as a result of a system failure and no individual tortfeasor can be identified, or where harm is caused by a third party to a plaintiff under the defendant's custody. Conversely, vicarious liability can operate in the absence of a non-delegable duty, in cases where the elements of a special hazard or a relationship of vulnerability or dependence are absent (eg an employee who negligently hits a pedestrian, while driving a vehicle in the course of employment). The two doctrines are conceptually and practically distinct.

**[40]** In light of the above, we see no reason why the doctrine of non-delegable duty should not continue to be applied in Malaysia, and we consider the guiding principles refined in *Woodland* as a useful starting point. Nevertheless, we hasten to stress that non-delegable duties impose more onerous obligations; it is worth reiterating the proviso in *Woodland* that such duties should be imposed only where it is fair, just and reasonable to do so based on the particular circumstances of the case, and developed incrementally from existing categories and consistently with underlying principles. With this reminder, we answer the first question in the affirmative.

APPEAL ON LIABILITY: SECOND QUESTION

**[41]** We now turn to consider the application of the doctrine to the present facts. The second question in the appeal on liability reads: 'If the doctrine of non-delegable duty of care as expounded in *Woodland v Swimming Teachers Association and others* [2014] AC 537 is applicable in Malaysia, whether the doctrine can or should apply to private hospitals such that those hospitals would be held liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising there as independent contractors?'.

*Submissions*

**[42]** Counsel for the hospital averred that the function of private hospitals in Malaysia is merely to provide hospital facilities, and not medical services; medical services are provided by registered medical practitioners such as Dr Kok. It was argued that the medical practitioners are not employees of the hospital but independent contractors. To impose a non-delegable duty on private hospitals in relation to the provision of medical services, it was submitted, would be contrary to the applicable statutory regime under the Private Healthcare Facilities and Services Act 1998 ('the PHFSA') and the Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 ('the Regulations'). On this basis, counsel distinguished the English hospital cases as they concerned public hospitals under a statutory obligation to provide medical care.

**[43]** Further, counsel highlighted that the plaintiff had specifically chosen Dr Kok to perform the function of providing medical services, and the hospital merely provided the facilities and back-up services for the operation. Since the hospital did not have a duty to provide medical services to the plaintiff to begin with, it was contended that the question of non-delegable duty does not arise and the *Woodland* test was not satisfied.

**[44]** The submissions by counsel for the plaintiff can be summarised as follows. The hospital is a healthcare provider, and Dr Kok's services were integrated into the hospital's system as such, based on the legislative scheme under the PHFSA and the Regulations. The hospital had delegated to Dr Kok its duty to provide a reasonable standard of healthcare to its patients, including the plaintiff who became a patient of the hospital upon admission. The critical relationship is between the hospital as a healthcare provider and the plaintiff as a vulnerable person. The arrangement between the hospital and Dr Kok does not affect the plaintiff's rights of redress as against the hospital.

**[45]** Counsel for the plaintiff further submitted that having chosen to engage in the commercial enterprise of providing healthcare to the public for profit, the hospital cannot escape liability for harm caused in the conduct of that enterprise by delegating performance to an independent contractor. It was also contended that the hospital was liable for its own negligence in failing to ensure that the patient was treated by an appropriate specialist, a hand and micro surgeon.

*Non-delegable duties in hospital cases*

**[46]** In determining the scope of the hospital's duty towards the plaintiff (if any), some illumination may be gleaned from the line of English hospital cases leading up to the decision in *Woodland*. The traditional view was that hospitals do not undertake a duty to treat patients, but only to procure the services of surgeons and other medical professionals. These professionals are not considered servants of the hospital. As long as the hospital has taken due care in selecting the professionals and to provide proper facilities at their disposal, the hospital cannot be held liable for the negligence of those professionals in treating the patient (see *Hillyer v The Governors of St Bartholomew's Hospital* [1909] 2 KB 820).

**[47]** The common law has since departed from the traditional position, in favour of a broader view of hospitals' duties towards patients. In *Gold v Essex County Council* [1942] 2 KB 293, a radiographer employed by the hospital negligently used a piece of ordinary lint instead of a lead-lined rubber cloth to cover the claimant's face during a treatment by Grenz rays. As a result, the claimant suffered severe injuries and disfigurement. The Court of Appeal held the hospital liable on the basis of vicarious liability.

**[48]** Lord Greene MR offered a broader basis for the hospital's liability: once the extent of the obligation assumed by a defendant is discovered, he 'cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf'. His Lordship formulated the question as follows:

> When a patient seeking free advice and treatment such as that given to the infant appellant knocks at the door of the respondents' hospital, what is he entitled to expect?

**[49]** Lord Greene rejected the notion that the hospital's duty was confined to administrative matters, providing proper facilities and selecting competent staff. On His Lordship's view, the hospital's duty included the treatment of patients with reasonable care, and such duty is not discharged by delegation whether or not any special skill was involved. Considering the example of nurses, it was opined that the obligation undertaken by a hospital towards the

patient is not merely to provide a skilful nurse, but to nurse him: 'A nurse, I should have thought, is employed by a hospital to nurse the patients ... and a patient would expect that the hospital employed a nurse to nurse him'.

**[50]** A similar issue arose before the Court of Appeal in *Cassidy v Ministry of Health* [1951] 2 KB 343. The plaintiff in that case lost the use of his left hand as a result of the alleged negligent post-operation treatment, conducted by staff employed by the hospital. The majority in the Court of Appeal held the hospital liable on the basis of vicarious liability. Denning LJ, on the other hand, expressed a robust minority (but not dissenting) view in an oft-quoted passage:

> I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.

**[51]** Denning LJ considered that the crucial factor was whether the surgeon was engaged by the patient or the hospital authorities. If the patient himself selected the surgeon, the hospital authorities are not liable for the surgeon's negligence. However, if having accepted a patient for treatment the hospital selected and engaged a surgeon to treat him, the hospital owed a duty to treat the patient with proper care and would be in breach of that duty if the surgeon failed to do so.

**[52]** In this regard, Denning LJ dismissed the distinction between those engaged under a contract of service or a contract for services — in other words, between employees and independent contractors — as irrelevant:

> ... the liability of the hospital authorities should not, and does not, depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff: all he knew was that he was treated in the hospital by people whom the hospital authorities appointed; and the hospital authorities must be answerable for the way in which he was treated.

**[53]** The principle was reiterated by Denning LJ in *Roe v Minister of Health* [1954] 2 QB 66, which concerned the liability of a hospital for alleged negligence by a part-time anaesthetist:

> ... the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself.

**[54]** The principle of non-delegable duty expounded in the cases above were affirmed by the House of Lords in *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals* [1995] 3 All ER 353; [1995] 2 AC 633.

**[55]** We observe that the statements above were made obiter, in the context of cases involving staff employed in public hospitals under a statutory duty to provide treatment for patients. However, we also note that the hospitals were held to be under a non-delegable duty to patients not on the basis that the negligent medical staff were their servants, but expressly regardless of the employment status of such staff. It was argued before us that these cases should be distinguished on the basis that private hospitals in Malaysia are under a different legislative regime, and it is to this argument that we now turn.

*Legislative scheme in Malaysia*

**[56]** In considering the position of private hospitals in Malaysia, we were referred to the PHFSA and the Regulations. Under s 2 of the PHFSA, a 'private hospital' is defined broadly as:

> any premises, other than a Government hospital or institution, used or intended to be used for the reception, lodging, treatment and care of persons who require medical treatment or suffer from any disease or who require dental treatment that requires hospitalization.

**[57]** Counsel for the hospital relied on s 78 of the PHFSA, in support of the contention that private hospitals do not have responsibility for the medical management of patients, and as such have not assumed duty to protect the patient from harm arising from medical services:

> 78 Medical or Dental Advisory Committee
>
> The licensee of a private healthcare facility or service shall ensure that —
>
> (a) the medical and dental management of patients vests in a registered medical practitioner and a registered dental practitioner respectively;
>
> (b) where the facility or service is a private hospital, private ambulatory care centre, private hospice or private psychiatric hospital, there is established a Medical Advisory Committee whose members shall be registered medical practitioners representing all medical practitioners practising in the facility or service to advise the Board of Management, the licensee and person in charge on all aspects relating to medical practice;
>
> (c) where the facility or service is a private hospital, private ambulatory care centre, private hospice, private psychiatric hospital or any other private healthcare premises as the Minister may specify providing or intending to

A provide both medical and dental services, the licensee establishes a Medical and Dental Advisory Committee whose members shall be registered medical practitioners and registered dental practitioners representing all medical and dental practitioners practising in the private hospital, private ambulatory care centre, private hospice and private
B psychiatric hospital to advise the Board of Management, the licensee and person in charge on all aspects relating to medical and dental practices respectively.

**[58]** We note that the above section refers to the establishment of advisory
C committees. Subsections (b) and (c) go on to make specific provision for private hospitals to establish Medical or Medical and Dental Advisory Committees to advise the Board of Management, the licensee and the person in charge on all aspects in relation to medical practice. Read in its context, we find it difficult to stretch the interpretation of sub-s (a) to conclude that the
D Legislature intended a far-reaching declaration on the duty of private hospitals generally.

**[59]** We were also referred to reg 14(1) of the Regulations, which provides
E that:

A patient admitted in a private healthcare facility or service shall be under —

(a) the professional care or treatment of a registered medical practitioner while a patient admitted for dental care or treatment shall be under the professional care or treatment of a registered dental practitioner; and
F

(b) the direct care or treatment of a healthcare professional.

**[60]** This is preceded by reg 11(4) of the Regulations, which reads:

G All registered medical practitioners or registered dental practitioners privileged to practise in the private healthcare facilities or services shall be considered as part of the organization.

**[61]** Read in their entirety, we do not consider that the relevant legislation
H warrants the interpretation that private hospitals are mere providers of facilities and not medical treatment. On the contrary, the legislative scheme clearly envisages that the function of private hospitals includes generally the 'treatment and care of persons who require medical treatment or suffer from any disease', and considers the services of medical practitioners as part of that
I function. The notion that the duty of a hospital is confined only to its facilities and staff selection has long been rejected in the common law. Such a notion is also incongruent with societal expectations of private hospitals as healthcare service providers; most patients do not perceive hospitals as providers of all the utilities and backup services *except* medical treatment. Adopting Lord Greene's

formulation, it is precisely medical treatment that patients expect when they knock on the door of the hospital. A

*Our decision on the second question*

**[62]** We therefore reject the arguments by counsel that all private hospitals are *always* or *never* under a non-delegable duty to patients, in respect of the medical treatment provided by doctors practicing there. Given that the role of the hospital may vary from patient to patient, the extent and scope of the hospital's duty towards the patient must be ascertained from the facts and circumstances of the case. B C

**[63]** Applying the *Woodland* features of non-delegable duties to the present case, we have no difficulty in concluding that the first feature has been satisfied: the plaintiff, as a patient admitted and undergoing operation in the premises of the hospital, was in an especially vulnerable position dependent on the Hospital against the risk of injury. D

**[64]** In relation to the second feature, the plaintiff was undoubtedly placed under the actual custody, charge or care of the hospital while he was admitted therein. The circumstances of the relationship between the plaintiff and the hospital need to be examined to determine whether it is possible to impute an assumption of a positive duty by the hospital to protect the plaintiff from harm. In this regard, it is pertinent that the plaintiff consulted Dr Kok at his private clinic in Taman Desa for an initial consultation prior to the operation, and for follow-up appointments subsequently. It was only upon Dr Kok's advice and pursuant to Dr Kok's referral letter that the plaintiff was admitted to the hospital for the operation. Significantly, the only negligent act in this case was that of Dr Kok in conducting the operation; the learned trial judge made no finding of fact that the hospital was negligent whether in its selection of practitioners, provision of facilities, or system of work. E F G

**[65]** It was contended before us that the hospital's liability should not depend on whether Dr Kok was the plaintiff's choice, as per Denning LJ's proviso in *Cassidy*. The courts below preferred the alternative test of which party would be in a better position to evaluate Dr Kok's competence, and found the hospital to have more resources and vested interest to make such evaluation. With respect, we are not so persuaded. Non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. It is not imposed based on relative resources or vested interest, nor does it depend on the terms of the relationship between the defendant and the person to whom the duty is delegated. The personal choice of a patient is not an independent test in itself but a relevant factor in applying the *Woodland* analysis, in particular in H I

A determining whether there is an antecedent patient-hospital relationship from which to impute an assumption of responsibility by the hospital towards the patient.

B **[66]** The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the plaintiff's engagement of Dr Kok and admission to the hospital, it can be inferred that the plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the hospital would merely provide the relevant facilities required for his admission and operation. In respect of the C conduct of the operation by Dr Kok, we do not find that the hospital has assumed a positive duty to protect the plaintiff from injury.

**[67]** This scenario can be contrasted with a hypothetical situation where a D patient enters a hospital and relies upon the latter's internal systems to be referred to any suitable doctor on duty. In that situation, the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty to ensure that he is treated with due care, by whomever the hospital engages to do so.

E

**[68]** As such, we find that the second feature in the *Woodland* formulation is not satisfied on the facts. Since the hospital had not assumed a positive duty in respect of the conduct of the operation, the questions of how the hospital chooses to perform the duty (the third feature), the hospital's delegation of an F integral part of that duty (the fourth feature), and the delegatee's negligence in the performance of the duty (the fifth feature) do not arise.

**[69]** It remains to be addressed the policy arguments that the hospital, having undertaken a commercial enterprise for profit, has 'deeper pockets' to G which the plaintiff should have recourse and ought to bear the risks of harm caused in that enterprise. This argument, no doubt motivated by a desire that the victim of a tort should not be left without compensation, risks running contrary to the fundamental principles on which non-delegable duties are based. Non-delegable duties are not imposed based on financial means or H profit; indeed, *Cassidy* concerned a voluntary hospital providing free services. To allow liability to be imposed not based on principle but on whoever has the deepest pockets would, to borrow the words of Glanville Williams, 'render unintelligible the distinction between tort liability and national insurance'.

I **[70]** Thus, we would answer the second question as follows: given the fact-sensitive nature of the *Woodland* test, whether private hospitals are in breach of a non-delegable duty to their patients by reason of the negligence of doctors practising there cannot be predetermined by a general pronouncement, but assessed based on the facts and circumstances of each case.

We are satisfied that the defining features of non-delegable duties identified in *Woodland* are not present in the instant case, and accordingly we find the hospital not liable for breach of a non-delegable duty to the plaintiff.

APPEAL ON LIABILITY: THIRD QUESTION

**[71]** The remaining two questions in the appeal on liability concern the scope of vicarious liability. The third question reads: 'Whether the criteria for imposing vicarious liability set out by Lord Phillips in the decision of the Supreme Court of UK in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 and as further explained and elaborated by the Supreme Court of UK in *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 applies in Malaysia?'. Both counsel for the plaintiff and the hospital agree that the criteria should so apply.

*The test in various claimants*

**[72]** We will begin with a summary of the cases we are invited to adopt. *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 concerned the Institute of the Brothers of the Christian School, a religion foundation composed of Roman Catholic lay brothers, for the purpose of furthering Christian education to poor boys. A residential school managed by charitable organisations had engaged the institute to provide the headmaster and teaching staff for the school from among its members. Former pupils of the school raised allegations of physical and sexual abuse by the brothers who were teachers at the school. The issue before the Supreme Court was whether the Institute can be held vicariously liable for the acts of abuse by the brothers.

**[73]** The Supreme Court found the institute vicariously liable. Delivering the judgment of the court, Lord Phillips described the two-stage test for imposing vicarious liability on D2 for the tortious act of D1:

(1) whether the relationship between D1 and D2 is sufficiently akin to that of employer and employee; and

(2) whether there is a sufficiently close connection between the D1-D2 relationship and D1's tortious act.

**[74]** In relation to stage 1, His Lordship identified a number of criteria which, when satisfied, 'give rise to policy reasons that make it fair, just and reasonable to impose vicarious liability on the employer':

(a) the employer is more likely than the employee to have the means to compensate the victim, and can be expected to be insured;

(b) the tort was committed as a result of the employee's activity done on behalf of the employer;

(c) the employee's activity was part of the employer's business activity;

(d) by employing the employee to carry on the activity, the employer has created the risk of the tort committed by the employee; and

(e) the employee was under the control of the employer, to a greater or lesser degree. Since many skills in modern employment are not susceptible to direction, the significance of control is that the employer can direct what the employee does, not how he does it.

**[75]** On the facts, Lord Phillips found that stage 1 was satisfied. The relationship between the teaching brothers and the Institute had all the essential elements of an employment relationship, in that:

(a) the institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body;

(b) the teaching activity of the brothers was undertaken because the provincial of the institute directed the brothers to undertake it;

(c) the teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute; and

(d) the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.

**[76]** The court further noted that the brothers were bound to the institute not by contract but by vows of obedience, and that the brothers were obliged to transfer all their earnings to the institute, from which the institute catered from their needs. These factors, in Lord Phillips' view, rendered the relationship between the brothers and the institute even closer than one of employment.

**[77]** At stage 2, Lord Phillips found that the requirement for the tortious act to be done 'in the course of employment' would plainly be satisfied where the employee does negligently what he is employed to do. However in the context of sexual abuse cases, His Lordship explained that the essential closeness of connection between relationship and abuse is satisfied where an employer uses the employee to carry on its business or further its own interests, in a manner which has created or significantly enhanced the risk of abuse. The creation of risk is not enough of itself to give rise to liability, but is an important element for consideration.

**[78]** On the facts, the relationship between the institute and the brothers enabled the institute to place the brothers in teaching positions. The brothers were so placed to achieve the common business and mission to provide

Christian education to boys. Taking into account the particular vulnerability of pupils in the school, the court held that the placement of the brother teachers greatly enhanced the risk of abuse. As such, stage 2 of the test was also satisfied.

**[79]** Stages 1 and 2 of the test in *Various Claimants* were refined by the Supreme Court in *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 respectively. In *Cox*, a prison service was held vicariously liable for the injury negligently caused by a prisoner to a kitchen manager, while working in the kitchen. Lord Reed considered the five criteria listed by Lord Phillips to be of different weight. The first criterion, the employer's means to compensate, was found unlikely to be of independent significance. The fifth criterion of control was similarly described to be less significant in modern times, where it is unrealistic to look for an employer's right to direct *how* an employee performs his duty. Nevertheless, affirming Lord Phillips' formulation that the control element only requires the employer to direct *what* the employee does, Lord Reed emphasised that 'the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability'.

**[80]** Lord Reed observed that *Various Claimants* represented a modern approach to vicarious liability, where harm is wrongfully caused by a tortfeasor who carries on activities as an integral part of the employer's business activities and for its benefit. The approach extends the scope of vicarious liability, but not without limit: no liability is imposed where the tortious act is entirely attributable to the 'recognisably independent business' of the tortfeasor or a third party.

**[81]** In *Mohamud*, stage 2 of the test was considered. The facts of the case were that an employee of a supermarket chain threatened and physically attacked a customer while working at a petrol station kiosk. On the facts, the Supreme Court found that the employee was purporting to act about the employer's business to serve customers, albeit with violence. Since the employer entrusted him with that position, the employer was held responsible for the employee's abuse of it.

**[82]** Lord Toulson explained that the 'close connection' test required the courts to first consider broadly the nature of the job entrusted to the employee, and secondly whether there was a sufficient connection between the employee's position of employment and his wrongful conduct.

*Our decision on the third question*

**[83]** As Lord Sumption observed, 'The law of vicarious liability is on the move'. Traditionally, the test for vicarious liability required (1) an employment

(or master-servant) relationship, where the employer had control over what the employee does and how he does it; and (2) that the wrongful act was committed in the 'course of employment', which was interpreted to include acts authorised by the employer as well as unauthorised modes of performing such authorised acts.

**[84]** The decision in *Various Claimants* follows a line of English authorities in expanding the two traditional requirements (see, for instance, *Short v J & W Henderson Ltd* [1946] SC (HL) 24, *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, *Lister and others v Hesley Hall Ltd* [2002] 1 AC 215, *Dubai Aluminium Co Ltd v Salaam and others* [2003] 2 AC 366 and *E v English Province of Our Lady of Charity and another* [2012] 4 All ER 1152; [2012] EWCA Civ 938). To summarise, at stage 1, relationships akin to employment are now included in the scope of vicarious liability in addition to employer-employee relationships. Multiple factors are to be taken into consideration at this stage, and the element of control is no longer regarded as determinative. At stage 2, the wrongful act needs not be authorised by the employer, but sufficiently closely connected with the relationship of employment. The closeness of connection would be satisfied where the employer uses the employee to carry on its business in furtherance of its interests, thereby increasing the risk of the tort being committed by the employee.

**[85]** We first consider the test of relationships akin to employment at stage 1. The approach of considering multiple factors in addition to control in determining a relationship of employment is consistent with the position in Malaysia (see *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 and *Mary Colete John v South East Asia Insurance Bhd* [2010] 6 MLJ 733). While the element of control is no longer regarded as the sole or determinative criterion, it remains an important factor. As held by this court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369:

> *In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion*. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. (Emphasis added.)

**[86]** Further, we consider that this development in the law is necessary and desirable to adapt to the needs of modern society, with its variety of business

arrangements and levels of professional skill not susceptible to direction. The rights of tort victims should not be unduly affected by internal changes in the employer's employment structure, which have nothing to do with the nature or risks of their activities (WVH Rogers, JA Jolowicz & PH Winfield, *Winfield and Jolowicz on Tort* (18th Ed, London: Sweet & Maxwell, 2010)). In applying the tests, courts should exercise their evaluative judgment to ensure that 'defendants cannot avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort' (per Lord Reed in *Cox*).

**[87]** Vicarious liability was traditionally explained based on the concepts of *respondeat superior* and *qui facit per alium facit per se*, to which Lord Reid acutely remarked 'The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it' (*Staveley Iron & Chemical Co Ltd v Jones* [1956] 1 All ER 403). In this regard, we find the judgments in *Various Claimants*, *Cox* and *Mohamud* helpful in recognising and articulating the true policy reasons underlying vicarious liability. Nevertheless, we would reiterate Lord Phillip's view that while the policy reasons cannot be ignored in considering the criteria for vicarious liability, the two are not the same.

**[88]** The underlying policy of vicarious liability, it has been said, is 'to ensure that liability for tortious wrongs is borne by a defendant with the means to compensate the victim' (per Lord Phillips). Relying on this policy, it is often argued that vicarious liability ought to be imposed on a defendant who has deeper pockets or insurance coverage. However, while the availability of compensation may be a relevant consideration in some cases, it does not in itself constitute the basis for imposing vicarious liability. Lord Reed's robust comment in *Cox* is worth reproducing in full:

> Neither of these, however, is a principled justification for imposing vicarious liability. The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves.

**[89]** It must be borne in mind that the expanded test of 'relationships akin to employment' in *Various Claimants* was developed in the context of that particular case, where the extraordinary nature of the relationship between the teaching brothers and the Institute, though involving a high degree of control and *all* the elements of an employment relationship, do not fall neatly within established categories of employees or independent contractors. The limits of the expanded test was underlined by Lord Sumption in *Woodland*:

> The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment: *Various Claimants v Catholic Child Welfare Society and others* [2013] 1 All ER 670; [2013] 2 AC 1;

A [2012] UKSC 56. *But it has never extended to the negligence of those who are truly independent contractors*, such as Mrs Stopford appears to have been in this case. (Emphasis added.)

B **[90]** With these modifications, we would adopt the stage 1 test in *Various Claimants* as elaborated upon in *Cox* and answer the third question in the affirmative in that respect. In relation to the stage 2 test in *Various Claimants* as explained in *Mohamud*, we note that the test is developed in the context of, and to cater for, intentional torts committed by employees. Since such an issue does not arise in the present case, we would leave open the question of the applicability of the stage 2 test at this juncture.

C

APPEAL ON LIABILITY: FOURTH QUESTION

D **[91]** The fourth and final question in the appeal on liability reads: 'Whether private hospitals in Malaysia such as the Appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?'.

E

*Submissions*

**[92]** Counsel for the hospital submitted that both stages of the test for imposing vicarious liability on the hospital were not satisfied on the facts. At F stage 1, it was contended that the criteria identified by Lord Sumption were not fulfilled: Dr Kok had the means to compensate the plaintiff; Dr Kok's medical services were not integrated into or conducted on behalf of the hospital; the plaintiff himself had selected the surgeon to provide the medical services; and the hospital did not have a say as to what Dr Kok does in its premises. At G stage 2, it was asserted that no connection existed between the tort and the relationship between the hospital and Dr Kok, for Dr Kok merely paid to use the hospital's facilities.

**[93]** Further, counsel for the hospital argued that the principle of vicarious H liability should be discarded altogether in relation to private medical practitioners. With compulsory indemnity for these practitioners, it was argued that concerns about the means of compensating tort victims have ceased. It was also submitted that the imposition of vicarious liability on private hospitals would run contrary to the legislative scheme, which provided distinct I roles for private hospitals and medical practitioners.

**[94]** On behalf of the plaintiff, it was submitted based on the legislative scheme that Dr Kok's services are integrated into the hospital's system of providing healthcare. The operation and the pre- and post-operation advice

rendered by Dr Kok were considered an integral part of the hospital's function. Policy and practical reasons were cited in support of imposing vicarious liability on the hospital: it was argued that the hospital should be responsible for the risks associated with its commercial enterprise, and patients should be able to look to the hospital's deepest pockets to recover damages.

**[95]** Counsel for the plaintiff acknowledged that with the recognition that hospitals owe a non-delegable duty to patients, vicarious liability has less importance in this context. Nevertheless, it was stressed that the result is the same whether non-delegable duty, vicarious liability, or direct liability were applied: the hospital cannot escape liability for Dr Kok's negligence.

*Our decision on the fourth question*

**[96]** We will first deal with the general question of whether private hospitals should or should not be vicariously liable for the negligence of medical doctors practising there. The vicarious liability of private hospitals cannot be rejected wholesale on the basis that the respective roles of the hospitals and medical practitioners are distinct and rigidly delineated by statute; as we have canvassed, such an interpretation is unsupported by the relevant legislation. As discussed earlier, neither can the means of compensation by the hospital or the practitioner be in itself determinative of vicarious liability.

**[97]** The test for vicarious liability in *Various Claimants* requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

**[98]** We now apply the test to the present facts. Stage 1 requires us to ascertain whether there is a relationship of employment or akin to employment between the hospital and Dr Kok. The doctor's practising agreement signed between the hospital and Dr Kok provides, among others, that:

(a) Dr Kok is an independent contractor and not a servant of the hospital. In this regard, we would add that the court is not precluded from looking beyond the labels ascribed by the parties to ascertain the true substance of the relationship;

(b) the hospital shall assist Dr Kok and provide the necessary back-up services for Dr Kok's consultancy service;

(c) Dr Kok is allowed to practise at the hospital on a non-exclusive basis;

(d) Dr Kok enjoys the right and freedom to operate his medical specialist service at the hospital without undue interference and interruption by the hospital, and shall be permitted to carry on his practice independently without obstruction or interference by from the hospital;

(e) Dr Kok shall endeavour to use the hospital's facilities in the treatment of his patients, subject to the best interests of the patient;

(f) Dr Kok is to be on call rotation at such time and for such period, and hold a number of clinical sessions as required by the hospital;

(g) the hospital does not pay any salary or allowance to Dr Kok; and

(h) Dr Kok may charge professional fees for consultation and procedures, whereas the hospital may levy operational, administrative or other fees.

**[99]** In respect of the element of control, it is clear from the doctor's practising agreement that Dr Kok's services were generally not subject to the hospital's control or interference. The same can be said in relation to the operation in question. Dr Kok was not directed or required by the hospital to conduct the operation, but advised and arranged it in the course of his own practice at his private clinic. Dr Kok's arrangement with the hospital was merely to provide for the plaintiff's admission and the necessary facilities for the operation. The absence of even a 'vestigial degree of control' by the hospital over Dr Kok's operation negates vicarious liability on its part for Dr Kok's negligence in that operation.

**[100]** In considering whether the operation was conducted by Dr Kok on behalf of the hospital as part of its business activity, we note that Dr Kok as a medical practitioner is generally considered as part of the hospital's organisation as a healthcare facility under the Regulations. Nevertheless, we are of the view that the specific operation in question was not undertaken on behalf of the hospital, but attributable to Dr Kok's own 'recognisably independent business'. The diagnosis of the plaintiff's condition, the advice to undergo the operation and the referral of the plaintiff to the hospital were not carried out in the course of on-call rotations or clinical sessions required by the hospital. Instead, they were done by Dr Kok in the course of his own practice in his private clinic. The fact that Dr Kok charges consultancy and operation fees for his patients, and receives no salary from the hospital, lends further weight to the inference that the operation was part of Dr Kok's independent business.

**[101]** For these reasons, we consider Dr Kok to be an independent contractor of the hospital in conducting the operation. Bearing in mind that the expanded test in *Various Claimants* does not extend vicarious liability to 'truly independent contractors', we do not find that the relationship between the hospital and Dr Kok is sufficiently akin to employment so as to give rise to vicarious liability for Dr Kok's negligence in conducting the operation. Since there is no such relationship, the stage 2 determination of the connection between the relationship and the tortious act does not arise.

**[102]** We therefore find that the hospital is not liable for Dr Kok's negligence, whether on the basis of non-delegable duty or vicarious liability. The liability for the plaintiff's injuries rests solely with Dr Kok.

APPEAL ON QUANTUM

**[103]** The sole question in the appeal on quantum reads: 'Whether, in the light of s 28A(1)(a) of the Civil Law Act 1956, a plaintiff who has suffered personal injuries by reason of a defendant's act or omission, may be awarded, as part of damages, medical expenses in respect of his personal injuries, but which medical expenses were borne and paid by an insurer?'.

**[104]** The issues in the present appeal revolve around:

(a) principles on the recovery of damages at common law;

(b) the interpretation and application of s 28A(1)(a) of the Civil Law Act 1956; and

(c) unjust enrichment.

We shall address these issues in turn.

*Common Law*

**[105]** It is trite that damages in tort are compensatory in nature. The tortfeasor is liable for all natural and direct consequences flowing from the wrongful act. The damages awarded for such consequences include special damages for those items which can be precisely measured in monetary terms, and general damages for those items not capable of exact calculation such as for pain and suffering or future losses.

**[106]** The general rule in awarding damages is to put the injured party in the same position as he would have been in if he had not sustained the wrong. The injured party is prima facie entitled to be compensated for his net loss; financial benefits accruing to him which he would not have received but for the tort should be taken into account and set off against the claim for damages

(*Halsbury's Laws of England*, 5th Reprint at paras 341–347).

**[107]** The general rule is subject to exceptions, where the plaintiff is allowed to recover the normal measure of damages although his normal loss has been diminished by other events. These exceptions have been referred to as the 'collateral source rule'. The rationale for these exceptions is that the law regards such events as collateral. Collateral matters are considered too remote to be taken into account in deciding what is the claimant's loss, and cannot be invoked by a tortfeasor to reduce the damages payable to the victim of his tort (*Halsbury's Laws* at paras 347 and 354; H McGregor, *McGregor on Damages* (19th Ed, London: Sweet & Maxwell, 2014) at paras 2-006, 38-147; D Kemp, M Kemp & R Havery, *The Quantum of Damages Vol 1: Personal Injury Claims* (3rd Ed, London: Sweet & Maxwell, 1967) at p 85).

**[108]** Such exceptions include circumstances where the plaintiff has received 'accidental de facto recoupment of part of the loss' (to borrow the words of Asquith LJ in *Shearman v Folland* [1950] 2 KB 43). The classic exceptions are the receipt of insurance benefits, gratuitous assistance, or proceeds of benevolence.

**[109]** In *Liffen v Watson* [1940] 1 KB 556, the plaintiff was unable to continue her employment and to receive free accommodation provided by her employer, as a result of the personal injuries sustained. Even though the plaintiff received free board and lodging from her father, the Court of Appeal allowed her claim for the value of the accommodation; the assistance by her father was 'no reason why she should not be heard to say that her loss of the board and lodging previously provided by her employer was as much a loss to her as if she had lost the actual sum in money', and 'a wrongdoer must recompense a plaintiff for all the damage which naturally flows from the wrongdoing'. Similarly, in *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the then Supreme Court allowed a claim for cost of care for a plaintiff, although she was in fact looked after at home by her family instead of in an institution. In these cases, the plaintiff 'who has suffered a loss is not necessarily prevented from recovering in respect of it merely because it leaves him personally no poorer in balance-sheet terms' (*Halsbury's Laws of England* at paras 344).

**[110]** One established exception to the general rule is where a plaintiff has purchased insurance and received payment from the insurance company. In an action by the plaintiff for personal injury caused by the negligence of the defendant, the insurance benefit received cannot be taken into account in reduction of the damages payable by the defendant. This principle was established in *Bradburn v The Great Western Railway Company* (1874) LR 10 Exch 1. Pigott B reasoned as follows:

> The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

**[111]** The principle in *Bradburn* was endorsed by the House of Lords in *Parry v Cleaver* [1970] AC 1, both by the majority who relied upon it by analogy and the minority who sought to distinguish it. Lord Pearson explained that 'the item of insurance money was too remote and collateral to be properly deductible from the damages payable for the plaintiff's injuries and detriment to his business which arose directly and naturally from the accident'. Lord Reid elucidated the rationale for the non-deductibility of insurance payments in the assessment of damages as follows:

> I think that *the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor* ... Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest ... I would also refer to the judgment of Asquith LJ, in *Shearman v Folland* where he said ( [1950] 1 All ER 976 at p 978; [1950] 2 KB 43 at p 46):
>
> > If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself. (Emphasis added.)

**[112]** In *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541; [1988] AC 514, Lord Bridge considered the two well-established exceptions to the prima facie rule that financial gains that the plaintiff would not have received but for the cause of action are to be taken into account in assessing damages: sums recovered under an insurance policy where the plaintiff has paid the premiums, and sums received from the benevolence of third parties. Explaining the basis of the exceptions as a matter of common sense, Lord Bridge stated that:

> In both these cases there is in one sense double recovery. If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: 'Why should the tortfeasor derive any benefit, in the one case, from the premiums

A which the plaintiff has paid to insure himself against some contingency, however caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff?

B **[113]** The two 'classic heads of exception to the basic rule' were once again considered by Lord Bridge in *Hodgson v Trapp and another* [1988] 3 All ER 870; [1989] AC 807, where it was observed that the common sense of the primary exceptions was obvious, and 'the reasoning relied on by courts in support of other exceptions has ... invariably been based on the application to a greater or lesser degree by analogy of the same reasons as are thought to justify C the primary exceptions'. His Lordship opined that it was in the context of considering those other exceptions that Lord Reid said in *Parry v Cleaver*: 'The common law has treated this matter as one depending on justice, reasonableness and public policy'.

D

**[114]** The insurance exception in *Bradburn* is recognised across other common law jurisdictions. The principle was reaffirmed by the Singaporean Court of Appeal in *Seagate Technology Pte Ltd & Anor v Goh Han Kim* [1995] 1 SLR 17 and in *Zarkovic Stanko v Owners Of The Ship Or Vessel 'Mara'* [2000] E 4 SLR 156. In the former case, Thean JA held that the claim was not barred by receipt of insurance payments, for a third party cannot claim the benefit of a private arrangement to which he was not a party and gave no consideration:

> The contract of insurance creates rights and obligations only between the insured and the insurer. The respondent, not being privy to the contract of insurance, F acquires no rights under it. Thus, he cannot seek to rely on the contract to say that the first appellants' damage or loss has already been compensated as a result of the payment out under the policy.

G **[115]** The principle was considered by the High Court of Australia in *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569. Dixon CJ discerned that insurance proceeds do not operate in relief of the liability of the negligent party:

> It was effected by the money of the plaintiff for his own benefit in the event of an H accident, a benefit both independent of and cumulative upon whatever right of redress against others might arise out of the circumstances of the accident.

**[116]** It is notable that in the various authorities referred to above, there is no difference in principle whether the plaintiff's insurers made payment to the I plaintiff himself, or made payment directly to third parties to cover expenses incurred by the plaintiff.

**[117]** The English authorities on insurance premiums were considered by our then Supreme Court in *Ward v Malaysian Airlines System Bhd* [1991] 3 MLJ

317. The facts of the case were these. The appellant was employed by the respondent as a pilot. As a result of an emergency crash landing of an aircraft flown by the appellant, the appellant suffered various injuries. Liability was admitted by the defendant.

**[118]** From the total amount of general and special damages assessed, the trial judge deducted the amount received by the appellant pursuant to a general accident policy taken out by the defendant for all employees. The appellant appealed against the deduction.

**[119]** Allowing the appeal, the Supreme Court held that the insurance benefits were not deductible both under the common law and under s 28A(1)(a). Mohamed Azmi SCJ described the nature of the benefits in the case as a 'border line situation', where the injured person has not directly contributed to the insurance scheme.

**[120]** Two cases were considered in particular by the Supreme Court. In *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541; [1988] AC 514, the House of Lords allowed the deduction of full 'sick pay' received by an injured employee from his employer under a scheme, where the employer was reimbursed for such payments under an insurance policy taken out by the employer with their insurers. In *Nabi v British Leyland (UK) Ltd* [1980] 1 All ER 667, the Court of Appeal allowed the deduction of statutory unemployment benefits received by an injured employee, where contributions were made by both the employer and the employee. In both cases, the deductions related only to the award of damages for loss of earnings.

**[121]** In distinguishing *Hussain* and *Nabi*, Mohamed Azmi SCJ found the insurance cover to be analogous to pension or gratuity and thus should not be deducted:

> To be deductible, the contractual payment should be analogous to wages such as 'sick pay' in *Hussain*'s case, or statutory unemployment benefits as in *Nabi*'s case. Here, the insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future, that the appellant is entitled under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law.

**[122]** The Supreme Court further held that the issue of deductibility has been put 'beyond doubt' by s 28A(1)(a) of the Civil Law Act 1956:

> Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death 'under any contract of assurance or insurance' shall not be taken

into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

**[123]** We observe that the decision in *Ward* did not cast doubt on the non-deductibility of insurance benefits in respect of personal insurance policies paid for by the plaintiff. This is consistent with the position adopted in the earlier decisions of this court in *Anna Jong Yu Hiong v Government of Sarawak* [1972] 2 MLJ 244 and *Ti Huck & Anor v Mohamed Yusof* [1973] 2 MLJ 62, in which deductibility was considered based on whether the nature of pension payments in those cases were analogous to insurance.

**[124]** We also note that in *Ward*, the Supreme Court considered the deductibility or otherwise of the sum received by the appellant from the entirety of the damages assessed, including general damages for pain and suffering as well as special damages. It was not suggested that the deductibility or non-deductibility of the insurance benefit was confined to damages for loss of earnings alone. As is clear from the passage quoted above, the reference to 'loss of earnings' was made in the context of distinguishing *Hussain* and *Nabi*, on the basis that the insurance benefit in *Ward* cannot be treated as wages paid by the respondent to the appellant.

**[125]** A similar issue arose in the Federal Court case of *Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125, albeit in the context of subrogation. The appellants were operators of a service station whereas the first respondent was the owner of a car. While driving the first respondent's car, an employee of the appellants' service station negligently knocked down a motorcyclist, causing injuries. The first respondent's insurers settled the claim by the motorcyclist against the first respondent for damages, and also paid for damages to the first respondent's car and other expenses. At the request of the insurers, the first respondent brought a claim against the appellants for the sums paid by the insurers.

**[126]** In defence, the appellants argued among others that the first respondent had suffered no loss as the claims of the motorcyclist and his own were settled by the insurers, and consequently the claim was 'totally misconceived, frivolous and an abuse of the process of law'. This court rejected the appellants' argument and dismissed the appeal. Chang Min Tat FCJ held that:

> This case clearly is concerned with the doctrine of subrogation under which *an insured must bring an action against the wrong-doer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own*: per Lord Diplock in *Hobbs v Marlowe* [1978] AC 16 at p 37. If the damages suffered by the insured himself either to his person or to his car had been

> settled and paid to him by the insurer under the policy of comprehensive insurance, the doctrine of subrogation still applies and the insurer may require the insured to take an action against the wrong-doer for the recovery of all the damages flowing from the latter's negligence. (Emphasis added.)

**[127]** Two English authorities were cited by this court with approval, and it is worth considering these authorities in further detail. In *Morley v Moore* [1936] 2 KB 359, the plaintiff, whose car was damaged through the defendant's negligence, recovered part of the damage sustained from his insurance company. Despite the insurer's request to the plaintiff not to make any claim against the defendant, the plaintiff brought an action against the defendant for the full amount of the damage. The Court of Appeal held that plaintiff's claim was not barred:

> *The plaintiff had the contractual right to recover under that insurance policy. The plaintiff also had the right to recover damages at common law, including this sum of 28l. 2s. 8d., against the wrongdoer. How is it then suggested that the enforcement of the one contract bars him from enforcing his common law right to sue?*
>
> ... the simple solution of this matter is for the insurance company to do that which they are entitled to do — namely, to ask him to hand them that sum. That is a perfectly simple solution, but I cannot see that the fact that they choose to forgo their right to receive this sum from their assured imposes any obligation upon him. *The insurance company may choose to make the assured a present of the 28l. 2s. 8d., but that does not affect his legal right*. (Emphasis added.)

**[128]** *Morley* was approved by the House of Lords in *Hobbs v Marlowe* [1977] 2 All ER 241; [1978] AC 16, where the House of Lords found that on being indemnified by his insurers for his loss, the plaintiff did not thereby lose his right of action against the defendant for the full amount.

**[129]** The line of cases above illustrate the important proposition that a plaintiff's right of action against a defendant for the full amount of loss suffered is not diminished or extinguished where such loss is indemnified by an insurer, whether or not the insurer chooses to exercise their right of subrogation.

**[130]** The Court of Appeal in *Sathisvaran a/l Chandrasegaran v Agilan a/l Vanmugelan & Anor* [2012] 4 MLJ 548 adopted a different approach. In that case, the respondents brought an action against the appellant for personal injuries sustained in a road accident, claiming among others the medical expenses incurred. The medical expenses of the first respondent were paid by his insurers. The sessions court allowed the first respondent's claim for the medical expenses, a decision which was affirmed by the High Court on appeal. The appellant further appealed to the Court of Appeal.

**[131]** The appeal was allowed. The Court of Appeal considered that the issue

of deductibility in *Ward* arose only in respect of general damages for loss of earnings, and determined that *Ward* and s 28A(1)(a) did not apply to the facts of the case. The decision of the Court of Appeal was based on the description of special damages as 'out of pocket expenses', as stated in *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 and formulated by Faiza Tamby Chik J in *Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy* [2005] 2 MLJ 679 as follows:

> I think special damage means 'out-of-pocket expenses' which consists of money incurred or paid by the plaintiff, which amount to a 'loss' to the plaintiff.

**[132]** The court then propounded that the test in a claim for special damages was whether the first respondent incurred the expenses or paid the amount, and reasoned that:

> Since the first plaintiff did not pay the medical expenses, he incurred no expenses with respect to the medical expenses. In other words, the medical expenses did not come from the pocket of the first plaintiff. He suffered no loss and therefore, he is not entitled to such claim. To allow such claim, would in our view tantamount to facilitating the first plaintiff's enrichment and it would be contrary to the universal rule that he is allowed to recover something which he has not lost.

**[133]** In reaching its decision, the Court of Appeal considered two conflicting decisions of the High Court — *Khairul Sham* and *Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban* [2006] 3 MLJ 174 — and preferred the approach in the former. In *Khairul Sham*, the High Court disallowed the plaintiff from claiming medical expenses paid for by his insurer; the right to recover such expenses was found to lie in the hand of the insurer, and to award the expenses would amount to enriching the plaintiff. As elaborated above, in our analysis of *Teo Kim Kien*, this reasoning is contrary to the principle that where an insurer has paid for a plaintiff's expenses, it is the plaintiff who sues on his cause of action against the wrongdoer, and the insurer has no cause of action of their own as against the wrongdoer.

**[134]** In contrast, in *Sin Hock Soon Transport*, the High Court applied the principle in *Ward* and held that the respondent was entitled to the monies received under his insurance policy for which he has paid the premiums, and also the special damages awarded in his claim against the appellants. The court disagreed with the restrictive interpretation of special damages to mean only monies paid out of the pocket of the respondent, noting that compensation has been awarded by the Supreme Court for care given by parents in *Marappan*.

**[135]** We observe that the Court of Appeal in *Sathisvaran* did not have the benefit of full argument and the extensive authorities now available before this court. We also note that apart from *Sathisvaran* and *Khairul Sham*, learned

counsel for appellants have not brought to our attention any other case law, local or foreign, which supports the same reasoning.

**[136]** The common law position in this regard is clear, and can be summarised thus. A defendant is liable for the direct and natural consequences of his wrongful act. The general rule for awarding damages is a plaintiff may only recover what he has lost, and any sum received in mitigation of his loss are to be taken into account in reduction of the damages. To this general rule there are well-established exceptions, where damages are awarded even though the plaintiff has technically not been left out of pocket in financial terms (see *Marappan* and *Liffen v Watson*).

**[137]** Insurance benefits received pursuant to an insurance policy, for which the plaintiff has paid the premiums, is a settled exception to the general rule. As can be distilled from the authorities, the rationales behind the principle that insurance benefits are not to be taken into account in the assessment of damages are as follows:

(a) the payment of monies under the insurance policy, being a bargain between the plaintiff and a third party, is a collateral matter separate and independent from the plaintiff's right of action as against the defendant;

(b) the defendant is not privy to the contract between the plaintiff and the insurer, thus cannot claim a benefit from the contract; and

(c) the plaintiff having paid the insurance premiums, it would be unjust and unreasonable in the circumstances that the benefit of the insurance payments should go to the tortfeasor and not the victim.

**[138]** The rationales above apply equally whether the medical expenses for injured party were paid out of his own pocket first before being claimed from the insurer, or, as in the present case, paid for directly by the insurers. We can discern no difference in principle whether the injured party received his entitlement under the insurance policy from the insurer in monetary terms, or derived the benefit thereof by the insurer making payment on his behalf.

**[139]** Applying the principles to the present case, the medical expenses for the treatment of the injuries suffered by the plaintiff are a natural and direct consequence of Dr Kok's negligent act, for which Dr Kok is liable. The plaintiff is entitled under his insurance policy to have the expenses paid for by his insurer, having made a contractual arrangement with his insurer and paid the premiums to provide for the very contingency. We consider that the plaintiff's contract with the insurer is a collateral and extraneous matter, and does not impinge on the plaintiff's claim against Dr Kok for damages suffered as a direct consequence of the tort (see Pigott B in *Bradburn*, Lord Pearson in *Parry v Cleaver*).

**[140]** Further, the benefit of the premiums paid by the plaintiff in anticipation of the contingency should not accrue to the tortfeasor, and the plaintiff should not be left worse off than if he had not taken out the insurance and paid for the premiums (see Lord Reid in *Parry v Cleaver*, Lord Bridge in *Hussain*). Per Zakaria Sam J (as he then was) in *Sin Hock Soon Transport*:

> ... it is only fair and just that the respondent here should not be penalized for his prudence and foresight in taking out an insurance policy to protect his life, permanent disability or medical expenses as a result of an accident.

**[141]** Thus, we also see no reason why the non-deductibility of insurance benefits should be confined to general damages for loss of earnings in the present case. Such an approach may be logical in other scenarios, where the benefit in question is in the nature of wages paid by an employer, and goes directly towards the plaintiff's earnings which he claims to have lost (*Hussain* and *Nabi*). However, as alluded to above, we note that the Supreme Court in *Ward* considered the deductibility of the lump sum payment received from the entire sum of the damages assessed, without apportioning general and special damages or distinguishing between damages for loss of earnings and for pain and suffering.

**[142]** We find further support from the authorities on subrogation to hold that, notwithstanding that the insurer has paid for the plaintiff's medical expenses, the plaintiff retains his right of action against Dr Kok for the full amount of damage suffered including those expenses. This is the case regardless whether or not the insurer has opted to exercise their right of subrogation: the plaintiff's right is unaffected whether the insurer has instructed him to bring the claim for its benefit (*Teo Kim Kien*), or the insurer has instructed him not to bring the claim (*Morley v Moore*), or the insurer has given no instruction to him in this regard (*Hobbs v Marlowe*).

*Section 28A(1)(a) of the Civil Law Act 1956*

**[143]** The common law principle on insurance benefits is codified in s 28A(1)(a) of the Civil Law Act 1956. The section reads:

> 28A Damages in respect of personal injury
>
> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
>
> (b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

**[144]** In interpreting the provision, we are mindful of s 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

> 17A Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

**[145]** Thus, in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, Gopal Sri Ram JCA (as he then was) said:

> When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, *the court is under a duty to adopt an approach that produces neither injustice nor absurdity*: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein. (Emphasis added.)

**[146]** The section is phrased in broad and general terms, in contrast with s 28A(2)(d) which applies specifically 'in assessing damages for loss of future earnings'. Nevertheless, it was argued that s 28A(1)(a) was not applicable in this case, and the phrase 'damages recoverable' should be read to exclude special damages that were not paid for by the plaintiff. In this regard, reliance was placed on various dicta referring to special damages as 'out-of-pocket expenses'.

**[147]** The common law has long recognised instances where special damages are recoverable although the plaintiff has not been left poorer in balance sheet terms. We see no reason in principle how, for instance, a claim for cost of care gratuitously provided by a plaintiff's parents in *Marappan* should be treated in any respect differently from a claim for medical expenses covered under an insurance policy. As such, we consider the description of special damages as 'out-of-pocket expenses' as an illustration for general guidance, and is not meant to be taken literally as a conclusive requirement in every case.

**[148]** More pertinently, an interpretation of 'damages recoverable' in s 28A(1)(a) to exclude damages which were not literally paid out of the pocket of the injured person would lead to anomalous results. The practical effect of such an interpretation would be that:

A (a) an injured person whose insurer paid for the medical expenses directly on his behalf would not be entitled to claim the medical expenses from the tortfeasor; but

B (b) an injured person who paid for the medical expenses himself first, and *then* claimed the expenses from his insurer, would be entitled to claim the medical expenses from the tortfeasor.

**[149]** An injured party may find himself in scenario 1 or 2 due to factors such as the policy or responsiveness of the particular insurance company, or whether C he went to a panel or non-panel clinic of the insurance company. Further, insurance policies providing for lump sum payouts (such as permanent disability or daily allowances) would fall under scenario 1, whereas policies providing for the coverage of expenses (such as medical costs, transport, or support equipment) would fall under scenario 2.

D

**[150]** We see no conceivable basis in the act, common law, or practical policy to prefer an interpretation that leads to anomalous results, depending on the particular procedure adopted by the insurance company or the precise type of E insurance policy. Given the broad terms in which s 28A(1) is framed, it is difficult to contemplate that the legislative intention was to introduce arbitrary distinctions in the law, leading to incongruous results based on the timing of the reimbursement by the insurer.

F **[151]** The purpose of the section, in line with its plain and natural meaning, was to exclude 'any sum paid or payable in respect of the personal injury under any contract of assurance or insurance' from being taken into account in the assessment of damages for personal injury not resulting in death. On both literal and purposive interpretations, we are of the view that s 28A(1)(a) applies G in this case. Since the sum paid by the insurer for the plaintiff's medical expenses is a sum paid in respect of personal injury under a contract of insurance, it cannot be taken into account in assessing damages awarded to the plaintiff.

H *Unjust enrichment*

**[152]** It remains to be addressed the suggestion that the plaintiff would be unjustly enriched if, having had the medical expenses paid for by the insurer, he is allowed to claim the same expenses from the surgeon. At the outset, we agree I with the Court of Appeal that unjust enrichment cannot be used to diminish the operation of s 28A(1)(a) which caters for specific circumstances such as the present case, for, equitable principles cannot operate to defeat clear statutory provisions (see the decision of this court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1).

**[153]** In any event, it is evident that the ingredients of unjust enrichment have not been made out by the plaintiff. The four requirements as expounded by this court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 to establish unjust enrichment are: 'the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust, and whether there are any special defences to the claim'. On the present facts, the insurance cover for the medical expenses was not gained by at Dr Kok's expense, but at the expense of the plaintiff himself. The plaintiff's entitlement to the insurance benefit under his contractual bargain is not unjust; neither is it unjust for Dr Kok to be liable to pay damages for the medical expenses arising from the personal injury, caused as a direct and natural result of Dr Kok's negligence.

**[154]** It is undisputed that the medical expenses in question were incurred for the treatment of personal injuries caused to the plaintiff by Dr Kok's negligence. In the circumstances, the tortfeasor is in no position to assert unjust enrichment in order to deprive the plaintiff of the benefit of his insurance arrangements and premium paid to cater for the event of a contingency, and appropriate such benefit for himself.

**[155]** For these reasons, we find that the plaintiff is entitled to his claim for medical expenses of RM19,632.84 under both the common law and s 28A(1)(a). Accordingly we would answer the question posed in the affirmative.

## CONCLUSION

**[156]** In view of the foregoing, we allow the Hospital's appeal on liability. We find Dr Kok solely liable for the damage suffered by the plaintiff, and the hospital is not liable whether vicariously for Dr Kok's negligence or in breach of a non-delegable duty of care. The decision of the Court of Appeal in respect of the hospital's liability is set aside. As to the appeal on quantum by the hospital and Dr Kok, we dismiss the appeal and affirm the decision of the Court of Appeal in allowing the plaintiff's claim for medical expenses.

*The hospital's appeal on liability allowed and its appeal on quantum dismissed.*

Reported by Kohila Nesan